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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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11 RICHARD HOM, an individual on behalf
of himself and JUSTIN KELLEY, an
12 individual on behalf of himself and on
behalf of all persons similarly situated,
13

14 Plaintiffs,

15 v.

16 DHL EXPRESS (USA), INC., an Ohio
corporation conducting business in the
17 State of California, and DOES 1 through
10,

18 Defendants.
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Case No. CV-08-3756 JL

**ANSWER AND AFFIRMATIVE
DEFENSES OF DHL EXPRESS (USA),
INC. TO CLASS ACTION COMPLAINT**

Defendant DHL Express (USA), Inc. ("Defendant" or "DHL"), hereby answers and asserts its affirmative defenses to the Class Action Complaint (the "Complaint") of Plaintiffs Richard Hom and Justin Kelley ("Plaintiffs") as follows:

PRELIMINARY STATEMENT

1. DHL admits that Plaintiffs have filed a purported class action lawsuit against DHL. DHL also admits that Plaintiffs are or were employees of DHL. Except as expressly admitted, DHL denies all the other allegations contained in Paragraph 1 and alleges that this matter is not suitable for class treatment.

2. DHL admits that Plaintiffs allege certain wage violations and seek damages on behalf of a class of individuals, but DHL denies any such violations and denies that Plaintiffs or the alleged class are entitled to any such relief. Except as expressly admitted, DHL denies all the other allegations contained in Paragraph 2 and alleges that this matter is not suitable for class treatment.

JURISDICTION

3. DHL admits that the Court possesses subject matter jurisdiction over this action, but DHL denies that Plaintiffs are entitled to any relief under 29 U.S.C. §216(b) (Fair Labor Standards Act) or 28 U.S.C. §1337. Except as expressly admitted, DHL denies all other allegations contained in Paragraph 3.

VENUE

4. DHL admits that venue is proper in this District. Except as expressly admitted, DHL denies all other allegations contained in Paragraph 4.

PARTIES

5. DHL denies that this action is suitable for class treatment and responds to the allegations set forth in Paragraph 5 as follows:

a. DHL does not opine with respect to Plaintiffs' allegation regarding their current residence as set forth in Paragraph 5(a).

b. DHL admits that Plaintiffs are or were employees of DHL and that they are or were employed as Field Services Supervisors. Except as expressly admitted, DHL

denies all other allegations contained in Paragraph 5(b).

c. DHL denies the allegations contained in Paragraph 5(c).

d. DHL denies the allegations contained in Paragraph 5(d).

e. DHL admits that Plaintiffs are or were employees of DHL and that they are or were employed as Field Services Supervisors. Except as expressly admitted, DHL denies all other allegations contained in Paragraph 5(e) and alleges that this matter is not suitable for class treatment.

6. DHL denies that this action is suitable for class treatment and further responds to the allegations set forth in Paragraph 6 as follows:

a. DHL admits that it is a delivery/shipping company which is headquartered in the State of Florida and which conducts business throughout the United States, in the State of California, and in the County of Alameda, and has, throughout the relevant time period. Except as expressly admitted, DHL denies all other allegations contained in Paragraph 6(a) and alleges that this matter is not suitable for class treatment.

b. DHL admits that Plaintiffs are or were employees of DHL. Except as expressly admitted, DHL denies all other allegations contained in Paragraph 6(b) and alleges that this matter is not suitable for class treatment.

c. DHL denies the allegations contained in Paragraph 6(c) and alleges that this matter is not suitable for class treatment.

7. DHL admits that Plaintiffs have filed a purported class action lawsuit against DHL. Except as expressly admitted, DHL denies all the other allegations contained in Paragraph 7 and alleges that this matter is not suitable for class treatment.

REPRESENTATIVE CLASS ALLEGATIONS

8. DHL admits Plaintiffs seek to bring a representative action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b). Except as expressly admitted, DHL denies all other allegations contained in Paragraph 8 and alleges that this matter is not suitable for class treatment.

9. DHL admits that Plaintiffs are alleging that this action is not subject to the

1 requirements and procedures of Federal Rule of Civil Procedure Rule 23. Except as expressly
2 admitted, DHL denies all other allegations contained in Paragraph 9 and alleges that this matter is
3 not suitable for class treatment.

4 10. DHL denies the allegations of Paragraph 10 and alleges that this matter is not
5 suitable for class treatment.

6 11. DHL denies the allegations set forth in Paragraph 11 as follows:

7 a. DHL denies the allegations contained in Paragraph 11(a) and alleges
8 that this matter is not suitable for class treatment.

9 b. DHL denies the allegations contained in Paragraph 11(b) and alleges
10 that this matter is not suitable for class treatment.

11 c. DHL denies the allegations contained in Paragraph 11(c) and alleges
12 that this matter is not suitable for class treatment.

13 12. DHL denies the allegations of Paragraph 12 and alleges that this matter is not
14 suitable for class treatment.

15 13. DHL denies the allegations of Paragraph 13 and alleges that this matter is not
16 suitable for class treatment.

17 14. DHL denies the allegations of Paragraph 14 and alleges that this matter is not
18 suitable for class treatment.

19 15. While DHL lacks knowledge or information sufficient to form an opinion as
20 to the truth of the allegations set forth in Paragraph 15, DHL admits that it is unaware of any
21 currently pending litigation brought on behalf of the same group of individuals. Except as expressly
22 admitted, DHL denies all other allegations contained in Paragraph 15.

23 16. DHL denies the allegations of Paragraph 16 and alleges that this matter is not
24 suitable for class treatment.

25 17. DHL denies the allegations of Paragraph 17 and alleges that this matter is not
26 suitable for class treatment.

27 **FACTS**

28 18. DHL admits the allegations contained in Paragraph 18.

19. DHL admits that Plaintiff Richard Hom is, and has been, employed by DHL since February 2007 as a Field Services Supervisor. DHL further admits that Justin Kelley was formerly employed by DHL as a Field Services Supervisor. Except as expressly admitted, DHL denies all other allegations contained in Paragraph 19.

20. DHL denies the allegations of Paragraph 20 and alleges that this matter is not suitable for class treatment.

21. DHL denies the allegations of Paragraph 21 and alleges that this matter is not suitable for class treatment.

22. DHL denies the allegations of Paragraph 22 and alleges that this matter is not suitable for class treatment.

FIRST CAUSE OF ACTION

FAIR LABOR STANDARDS ACT CLAIM (By the CLASS and Against All Defendants)

23. DHL incorporates by reference its responses to Paragraphs 1-22 as though set forth here in their entirety.

24. DHL denies the allegations of Paragraph 24 and alleges that this matter is not suitable for class treatment.

SECOND CAUSE OF ACTION

FOR FAILURE TO PAY OVERTIME COMPENSATION [Cal. Lab. Code §§ 510, 515.5, 1194 and 1198] (By the CLASS and Against All Defendants)

25. DHL incorporates by reference its responses to Paragraphs 1-24 as though set forth here in their entirety.

26. DHL cannot admit or deny the allegations in Paragraph 26 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

27. DHL cannot admit or deny the allegations in Paragraph 27 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

28. DHL denies the allegations of Paragraph 28 and alleges that this matter is not suitable for class treatment.

1 29. DHL cannot admit or deny the allegations in Paragraph 29(a)–(f) of Plaintiffs’
2 Complaint because they call for legal conclusions rather than admissions or denials of fact.

3 30. DHL denies the allegations set forth in Paragraph 30 and alleges that this
4 matter is not suitable for class treatment as follows:

5 a. DHL denies the allegations contained in Paragraph 30(a) and alleges
6 that this matter is not suitable for class treatment.

7 b. DHL denies the allegations contained in Paragraph 30(b) and alleges
8 that this matter is not suitable for class treatment.

9 c. DHL denies the allegations contained in Paragraph 30(c) and alleges
10 that this matter is not suitable for class treatment.

11 d. DHL denies the allegations contained in Paragraph 30(d) and alleges
12 that this matter is not suitable for class treatment.

13 e. DHL denies that Wage Order No. 4 applies to Plaintiffs. Except as
14 expressly admitted, DHL denies all other allegations contained in Paragraph 30(e) and alleges that
15 this matter is not suitable for class treatment.

16 31. DHL denies the allegations set forth in Paragraph 31 and alleges that this
17 matter is not suitable for class treatment.

18 32. DHL denies the allegations set forth in Paragraph 32 and alleges that this
19 matter is not suitable for class treatment.

20 33. DHL denies the allegations set forth in Paragraph 33 and alleges that this
21 matter is not suitable for class treatment.

22 34. DHL denies the allegations set forth in Paragraph 34 and alleges that this
23 matter is not suitable for class treatment.

24 35. DHL admits that Plaintiffs are seeking recovery of compensation and
25 penalties pursuant to the California Labor Code and/or other statutes, in addition to attorneys’ fees
26 and costs, but DHL denies that Plaintiffs are entitled to any such relief and alleges that this matter is
27 not suitable for class treatment.
28

THIRD CAUSE OF ACTION

FOR FAILURE TO PROVIDE MEAL PERIODS AND REST PERIODS
[Cal. Lab. Code §§226.7 and 512] (By the CLASS and Against All Defendants)

36. DHL incorporates by reference its responses to Paragraphs 1-35 as though set forth here in their entirety.

37. DHL cannot admit or deny the allegations in Paragraph 37 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

38. DHL cannot admit or deny the allegations in Paragraph 38 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

39. DHL denies the allegations set forth in Paragraph 39 and alleges that this matter is not suitable for class treatment.

40. DHL denies the allegations set forth in Paragraph 40 and alleges that this matter is not suitable for class treatment.

41. DHL cannot admit or deny the allegations in Paragraph 41 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

42. DHL cannot admit or deny the allegations in Paragraph 42 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

43. DHL denies the allegations set forth in Paragraph 43 and alleges that this matter is not suitable for class treatment.

44. DHL denies the allegations set forth in Paragraph 44 and alleges that this matter is not suitable for class treatment.

45. DHL denies the allegations set forth in Paragraph 45 and alleges that this matter is not suitable for class treatment.

46. DHL denies the allegations set forth in Paragraph 46 and alleges that this matter is not suitable for class treatment.

47. DHL denies the allegations set forth in Paragraph 47 and alleges that this matter is not suitable for class treatment.

FOURTH CAUSE OF ACTION

FOR FAILURE TO PAY WAGES WHEN DUE
[Cal. Lab. Code §230] (By the CLASS and Against All Defendants)

48. DHL incorporates by reference its responses to Paragraphs 1-47 as though set forth here in their entirety.

49. DHL cannot admit or deny the allegations in Paragraph 49 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

50. DHL cannot admit or deny the allegations in Paragraph 50 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

51. DHL cannot admit or deny the allegations in Paragraph 51 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

52. DHL denies the allegations set forth in Paragraph 52 and alleges that this matter is not suitable for class treatment.

53. DHL admits that Plaintiffs seek certain penalties pursuant to Labor Code §203 as well as an accounting and payment of wages due, plus interest, attorneys fees and costs, but DHL denies that Plaintiffs are entitled to any such relief and alleges that this matter is not suitable for class treatment.

FIFTH CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE ITEMIZED STATEMENTS
[Cal. Lab. Code §226] (By the CLASS and Against All Defendants)

54. DHL incorporates by reference its responses to Paragraphs 1-53 as though set forth here in their entirety.

55. DHL cannot admit or deny the allegations in Paragraph 55 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

56. DHL denies the allegations set forth in Paragraph 56 and alleges that this matter is not suitable for class treatment.

57. DHL denies the allegations set forth in Paragraph 57 and alleges that this matter is not suitable for class treatment.

SIXTH CAUSE OF ACTION

FOR UNLAWFUL BUSINESS PRACTICES
[Cal. Bus. And Prof. Code §§17200 et seq.] (By the CLASS and Against All Defendants)

58. DHL incorporates by reference its responses to Paragraphs 1-57 as though set forth here in their entirety.

59. DHL cannot admit or deny the allegations in Paragraph 59 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

60. DHL cannot admit or deny the allegations in Paragraph 60 of Plaintiffs' Complaint because they call for legal conclusions rather than admissions or denials of fact.

61. DHL denies the allegations set forth in Paragraph 61 and alleges that this matter is not suitable for class treatment.

62. DHL denies the allegations set forth in Paragraph 62 and alleges that this matter is not suitable for class treatment.

63. DHL denies the allegations set forth in Paragraph 63 and alleges that this matter is not suitable for class treatment.

64. DHL denies the allegations set forth in Paragraph 64 and alleges that this matter is not suitable for class treatment.

65. DHL denies the allegations set forth in Paragraph 65 and alleges that this matter is not suitable for class treatment.

66. DHL denies the allegations set forth in Paragraph 66 and alleges that this matter is not suitable for class treatment.

AFFIRMATIVE DEFENSES

In further answer to the Complaint, and as separate and distinct affirmative and other defenses, DHL alleges the following defenses. In asserting these defenses, DHL does not assume the burden of proof as to matters that, as a matter of law, are Plaintiffs' burden to prove.

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

1. As a separate and distinct affirmative defense, DHL alleges that the

1 Complaint, and each and every alleged cause of action therein, fails to state facts sufficient to
2 constitute a cause of action upon which relief can be granted.

3
4 SECOND AFFIRMATIVE DEFENSE
(Class Action – Certification Prerequisites)

5 2. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs
6 cannot satisfy the prerequisites for class certification and therefore cannot represent the interest of
7 others.

8
9 THIRD AFFIRMATIVE DEFENSE
(Class Action – Standing)

10 3. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs lack
11 standing to assert the legal rights or interests of others.

12
13 FOURTH AFFIRMATIVE DEFENSE
(Class Action – Lack of Predominance)

14 4. As a separate and distinct affirmative defense, DHL alleges that the types of
15 claims alleged by Plaintiffs on behalf of themselves and/or the alleged putative group they purport to
16 represent are matters in which individual questions predominate and thus are not appropriate for
17 class treatment.

18
19 FIFTH AFFIRMATIVE DEFENSE
(Class Action – Lack of Numerosity)

20 5. As a separate and distinct affirmative defense, DHL alleges that the alleged
21 putative group that Plaintiffs could represent is not so numerous that joinder is impossible.

22
23 SIXTH AFFIRMATIVE DEFENSE
(Class Action – Lack of Commonality)

24 6. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs are
25 not similarly situated to other potential members of the alleged putative group they purport to
26 represent and thus are inadequate representatives of the alleged putative group.

SEVENTH AFFIRMATIVE DEFENSE
(Class Action – Lack of Typicality)

7. As a separate and distinct affirmative defense, DHL alleges that certain of the interests of the alleged putative group are in conflict with the interests of all or certain subgroups of the members of the putative group.

EIGHTH AFFIRMATIVE DEFENSE
(Class Action – Inadequate Representation)

8. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs are not similarly situated to other potential members of the alleged putative group they purport to represent and thus they are inadequate representatives of the alleged putative group.

NINTH AFFIRMATIVE DEFENSE
(Class Action – Lack of Superiority)

9. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs have not shown and cannot show that class treatment of the purported causes of action in the Complaint is superior to other methods of adjudicating the controversy.

TENTH AFFIRMATIVE DEFENSE
(Class Action – Lack of Manageability)

10. As a separate and distinct affirmative defense, DHL alleges that the Complaint and each purported cause of action alleged therein, cannot proceed as a purported class or collective action because of difficulties likely to be encountered that render the action unmanageable.

ELEVENTH AFFIRMATIVE DEFENSE
(Class Action – Violation of Due Process)

11. As a separate and distinct affirmative defense, DHL alleges that certification of a class, as applied to the facts and circumstances of this case, would constitute a denial of DHL's due process rights, both substantive and procedural, in violation of the Fourteenth Amendment to the United States Constitution and the California Constitution. DHL reserves the right to amend its answer upon further investigation and discovery of facts supporting this defense.

TWELFTH AFFIRMATIVE DEFENSE
(Good Faith)

12. As a separate and distinct affirmative defense, DHL is informed and believes that further investigation and discovery will reveal, and on that basis alleges, that any violation of the Labor Code or an Order of the Industrial Welfare Commission, was an act or omission made in good faith and DHL had reasonable grounds for believing that policies and practices complied with applicable laws and that any such act or omission was not a violation of the Labor Code or any Order of the Industrial Welfare Commission such that Plaintiffs are entitled to any damages.

THIRTEENTH AFFIRMATIVE DEFENSE
(Labor Code §§ 226, 226.7, 510, 512 and 1194 – No Private Right of Action)

13. As a separate and distinct affirmative defense, DHL alleges that there is no private right of action for an employee to recover damages under Sections 226, 226.7, 510, 512 and 1194 of the California Labor Code.

FOURTEENTH AFFIRMATIVE DEFENSE
(Consent)

14. As a separate and distinct affirmative defense, DHL alleges that the Complaint is barred, in whole or in part to the extent that Plaintiffs consented to, encouraged, or voluntarily participated in all actions taken, if any.

FIFTEENTH AFFIRMATIVE DEFENSE
(Unconstitutional Wage Order)

15. As a separate and distinct affirmative defense, DHL alleges that the Complaint and each cause of action therein, or some of them, are barred because the applicable wage order(s) of the Industrial Welfare Commission is unconstitutionally vague and ambiguous and violates DHL's rights under the United States Constitution and the California Constitution as to, among other things, due process of law.

SIXTEENTH AFFIRMATIVE DEFENSE
(Rule 23 Action Not Superior - Conflicting Opt-In/ Opt-Out Mechanisms)

16. As a separate and distinct affirmative defense, DHL alleges that a Rule 23

1 action is not the superior method of adjudicating Plaintiffs' alleged state law claims in light of the
 2 opt-in mechanism contemplated by the FLSA collective action. Use of both mechanisms will
 3 confuse potential class members and burden the Court and thus a Rule 23 action should not be
 4 permitted. *See e.g. Leuthold v. Destination America* 224 F.R.D. 462 (N.D. Cal. 2004).

5
 6 SEVENTEENTH AFFIRMATIVE DEFENSE
 (Labor Code §§ 226.7 and 512 – Compliance with Obligations)

7 17. As a separate and distinct affirmative defense, DHL alleges that it acted in a
 8 reasonable and good faith belief that it complied with its obligations, if any, under the California
 9 Labor Code, specifically including Sections 226.7 and 512 thereof, as to Plaintiffs.

10
 11 EIGHTEENTH AFFIRMATIVE DEFENSE
 (No Failure To Provide Meal Periods)

12 18. As a separate and distinct affirmative defense, DHL alleges that it was not
 13 required to and/or did not fail to provide meal periods pursuant to the California Labor Code,
 14 applicable wage orders issued by the Industrial Welfare Commission, or any other basis.

15
 16 NINETEENTH AFFIRMATIVE DEFENSE
 (Not Entitled to Overtime Pay)

17 19. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs or
 18 members of the putative class they seek to represent were not entitled to payment of overtime
 19 premiums to the extent that they were exempt from overtime requirements under the executive
 20 and/or administrative exemptions pursuant to, but not limited to, the Fair Labor Standards Act, the
 21 California Labor Code, and the provisions of the California Industrial Welfare Commission wage
 22 orders.

23
 24 TWENTIETH AFFIRMATIVE DEFENSE
 (Not Entitled to Meal and Rest Periods)

25 20. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs or
 26 members of the putative class they seek to represent were not entitled to mandatory meal and rest
 27 periods under California law, nor are they entitled to recover penalties under California law for
 28 allegedly missed meal or rest periods, to the extent that they were exempt from meal and rest period

1 requirements pursuant to, but not limited to, the California Labor Code, and the provisions of the
2 California Industrial Welfare Commission wage orders.

3 TWENTY-FIRST AFFIRMATIVE DEFENSE
4 (Bus. & Prof. Code § 17200 – Violates Due Process)

5 21. As a separate and distinct affirmative defense, DHL alleges that the
6 prosecution of a representative action on behalf of the general public under California Business and
7 Professions Code section 17200 et seq., as applied to the facts and circumstances of this case, would
8 constitute a denial of DHL's due process rights, both substantive and procedural, in violation of the
9 California Constitution and the Fourteenth Amendment to the United States Constitution.

10 TWENTY-SECOND AFFIRMATIVE DEFENSE
11 (Bus. & Prof. Code § 17200 – No Penalties)

12 22. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs
13 cannot recover waiting time or other penalties, under California Business and Professions Code
14 section 17200 et seq.

15 TWENTY-THIRD AFFIRMATIVE DEFENSE
16 (Bus. & Prof. Code § 17200 – No Penalties By Way of Restitution)

17 23. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs'
18 prayer for restitution pursuant to Business and Professions Code section 17200 et seq. is barred with
19 respect to penalties of any nature.

20 TWENTY-FOURTH AFFIRMATIVE DEFENSE
21 (Bus & Prof. Code § 17200 – No Violation)

22 24. As a separate and affirmative defense, DHL alleges that its business practices
23 were not "unfair," "unlawful," or "deceptive" within the meaning of California Business and
24 Professions Code section 17200 et seq.

25 TWENTY-FIFTH AFFIRMATIVE DEFENSE
26 (Discontinued Violations)

27 25. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs'
28 prayer for restitution or injunctive relief under California Business and Professions Code § 17200 et

1 *seq.*, is barred with respect to any alleged violations that have discontinued, ceased, or are not likely
2 to reoccur.

3 TWENTY-SIXTH AFFIRMATIVE DEFENSE
4 (Labor Code § 226 – Lack of Injury)

5 26. As a separate and distinctive affirmative defense, DHL alleges that Plaintiffs
6 sustained no injury from any alleged failure by DHL to comply with Labor Code section 226.

7 TWENTY-SEVENTH AFFIRMATIVE DEFENSE
8 (Failure to State a Claim for Attorneys' Fees and Costs)

9 27. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs
10 failed to state facts sufficient to constitute a claim for which attorneys' fees and costs may be
11 awarded.

12 TWENTY-EIGHTH AFFIRMATIVE DEFENSE
13 (Lack of Specificity)

14 28. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs has
15 failed to allege special damages with requisite specificity.

16 TWENTY-NINTH AFFIRMATIVE DEFENSE
17 (Statute of Limitations)

18 29. As a separate and distinct affirmative defense, DHL alleges that each
19 purported cause of action set forth in the Complaint is barred in whole or in part by the applicable
20 statute(s) of limitation, including without limitation, the three-year limitations period contained in
21 California Code of Civil Procedure section 338(a); the one-year limitations period governing
22 recovery of statutory penalties contained in California Code of Civil Procedure section 340(a);
23 and/or the four year limitations period found in Business and Professions Code section 17208.

24 THIRTIETH AFFIRMATIVE DEFENSE
25 (Liquidated Damages)

26 30. As a separate and distinct affirmative defense, DHL alleges that it had a good
27 faith and reasonable belief that it was in compliance with applicable law and that, accordingly no
28 liquidated damages should be awarded Plaintiffs for any violation thereof that may be found to exist.

THIRTY-FIRST AFFIRMATIVE DEFENSE
(Mitigation of Damages)

31. As a separate and distinct affirmative defense, DHL alleges that it is informed and believes that a reasonable opportunity for investigation and discovery will reveal, and on that basis alleges, Plaintiffs have failed to exercise reasonable care to mitigate their damages, if any were suffered, and that their right to recover against DHL should be reduced and/or eliminated by such a failure.

THIRTY-SECOND AFFIRMATIVE DEFENSE
(Avoidable Consequences)

32. As a separate and distinct affirmative defense, DHL alleges that each purported cause of action contained in the complaint, or some of the causes of action, are barred, or any recovery should be reduced, pursuant to the avoidable consequences doctrine because DHL took reasonable steps to prevent and correct improper wage payments. Plaintiffs unreasonably failed to use the preventative and corrective opportunities provide to them by DHL, and reasonable use of DHL's procedures would have prevented at least some, if not all, of the harm that Plaintiffs allegedly suffered.

THIRTY-THIRD AFFIRMATIVE DEFENSE
(No Proximate Cause)

33. As a separate and distinct affirmative defense, DHL alleges that Plaintiffs' alleged injuries were not proximately caused by any unlawful policy, custom, practice and/or procedure promulgated and/or tolerated by DHL.

THIRTY-FOURTH AFFIRMATIVE DEFENSE
(Failure by Plaintiffs to Meet Reasonable Expectations)

34. As a separate and distinct affirmative defense, DHL alleges that it is informed and believes that a reasonable opportunity for investigation and discovery will reveal, and on that basis alleges, that any damages suffered were the result of failure by Plaintiffs to comply with the reasonable expectations of DHL and/or follow DHL's reasonable instructions and/or policies.

THIRTY-FIFTH AFFIRMATIVE DEFENSE
(Laches, Estoppel and Unclean Hands)

35. As a separate and distinct affirmative defense, DHL alleges that some or all of the purported causes of action alleged in the Complaint are barred in whole or in part by the equitable doctrines of laches, avoidable consequences, estoppel and/or unclean hands.

THIRTY-SIXTH AFFIRMATIVE DEFENSE
(Release/Waiver)


36. As a separate and distinct affirmative defense, DHL alleges that some or all of the purported causes of action alleged in the Complaint are barred in whole or in part by the doctrine of waiver and/or have been satisfied, released or otherwise discharged.

PRAYER FOR RELIEF

WHEREFORE, DHL prays for relief as set forth below:

1. Plaintiffs takes nothing by the Complaint and the Complaint be dismissed with prejudice;
2. For costs of suit and reasonable attorneys' fees incurred herein; and
3. For such other and further relief as this Court deems proper.

Dated: September 8, 2008


 LAURA E. HAYWARD
 LITTLER MENDELSON
 A Professional Corporation
 Attorneys for Defendant
 DHL EXPRESS (USA) INC.

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